Petition

81-781

No.

Office - Supreme Court, U.S.
FILED
OCT 23 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

SEA-LAND SERVICE, INC., *ET AL.*,

Petitioners,

v.

THE ALASKA RAILROAD, *ET AL.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is an agency of the United States, acting solely in a proprietary capacity, subject to suit by a competitor for treble damages and injunctive relief for violations of the Sherman Act?

REFERENCE TO PARTIES BELOW

The following were parties in the proceedings below:

Sea-Land Service, Inc.

Sea-Land Freight Service, Inc.[1]

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[1]Parent companies, subsidiaries and affiliates of petitioners Sea-Land Service, Inc., and Sea-Land Freight Service Inc., are as follows: R.J. Reynolds Industries, Inc.; Del Monte Corporation; R.J. Reynolds Tobacco Company; RJR Macdonald Inc.; R.J. Reynolds Tobacco GmbH; R.J. Reynolds Tobacco International Export, Inc.; R.J. Reynolds Tobacco International, S.A.; RJR Archer, Inc.; RJR Foods, Inc.; Aminoil International, Inc.; American Independent Oil Company; Aminoil USA, Inc.; Reynolds Leasing Corporation; Sea-Land Industries Investments, Inc.; Sea-Land Industries, Inc.; Affiliated Forwarding Services, Inc.; Buyers and Shippers Enterprises, Inc.; Buyers Consolidators Limited; Equipment, Inc.; Gulf-Puerto Rico Lines, Inc.; International Sea-Land Shipping Service, Ltd.; Island Terminals, Inc.; North Pacific Marine Service, Inc.; Port Authority of Jebel Ali (Private) Ltd.; S-L Distribution Service, Inc.; Sea-Land Belgium, N.V.; Sea-Land Caribe, Inc.; Sea-Land Containerised Freight Services Pty. Ltd.; Sea-Land Containership, A.B.; Sea-Land Containerships Limited; Northern Lights Express, Inc.; Sea-Land (Germany) Transport GmbH; Sea-Land Iberica, S.A.; Sea-Land (Nederland) B.V.; Sea-Land Orient Limited; Sea-Land Servico De Contentores (Portugal) Limitada; Sea-Land (Switzerland) A.G.; Sea-Land Italia, S.p.A.; Sea-Land Industries U.S.A., Inc.; Container Stevedoring Co., Inc.; Frazers Hog Cay, Inc.; Gulf Florida Terminal Co., Inc.; IOI Ships, Inc.; Mail Express, Inc.; M.I. Container Stevedoring, Inc.; Sea-Land World Service, Inc.; Sea-Land Servicos Ltda.; Sea-Land Industries (Bermuda) Ltd.; Maritime Opportunities, Ltd.; I.O.I. Ships, Ltd.; Oceanic Enterprises (Pte) Ltd.; and, Sea-Land Corporation.

The Alaska Railroad
The Federal Railroad Administration
The Department of Transportation
Manager, the Alaska Railroad
Administrator, Federal Railroad Administration
Secretary, Department of Transportation
Alaska Hydro-Train Corporation
Crowley Maritime Corporation

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported. The memorandum opinion of the United States District Court for the District of Columbia is reported at 1980-2 Trade Cas. ¶ 63,481 (D.D.C. 1980). (The opinion of the Court of Appeals and the memorandum opinion of the District Court are reproduced in Appendices A and B hereto).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered July 27, 1981.

The Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C.A. § 1254(1) (1966) which authorizes review of the judgments of the United States Courts of Appeals by writ of certiorari.

STATUTES INVOLVED

The full text of Section 1 of the Sherman Act, 15 U.S.C.A. § 1 (West Supp. 1981) is set forth in Appendix C hereto. In pertinent part, this statute provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The full text of Section 2 of the Sherman Act, 15 U.S.C.A. § 2 (West Supp. 1981) is set forth in Appendix C hereto. In pertinent part, this statute provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

Section 8 of the Sherman Act, 15 U.S.C.A. § 7 (1973) provides, in its entirety, that:

> The word "person" or "persons," wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United

States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

The full text of Section 4 of the Clayton Act, 15 U.S.C.A. § 15 (West. Supp. 1981), is set forth in Appendix C hereto. In pertinent part, this statute provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The full text of Section 4A of the Clayton Act, 15 U.S.C.A. § 15a (West Supp. 1981), is set forth in Appendix C hereto. In pertinent part, this statute provides:

> Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit.

The full text of Section 16 of the Clayton Act, 15 U.S.C.A. § 26 (West Supp. 1981), is set forth in Appendix C hereto. In pertinent part, this statute provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . .

STATEMENT OF THE CASE

The petitioners, Sea-Land Service, Inc., and Sea-Land Freight Service, Inc. (collectively referred to as "Sea-Land"), are competitors of the Alaska Railroad in the transportation of goods in interstate commerce. Sea-Land Service, Inc., carries freight in containers via water between the ports of Seattle, Washington, and Anchorage, Alaska. The containers are then delivered by Sea-Land Freight Service, Inc., or other truckers to points in Anchorage or transported to other cities served by the Alaska Railroad, including Seward, Whittier and Fairbanks.

The Alaska Railroad is a common carrier operating between the Alaska cities of Seward, Whittier, Anchorage and Fairbanks.[2] The Alaska Railroad and Alaska Hydro-Train Corporation ("Hydro-Train")[3] offer a joint through service to shippers in the Alaska trade in competition with service offered by Sea-Land and others. Hydro-Train moves the freight by barge from Seattle to Whittier, and the Railroad, acting in its proprietary capacity as a common carrier, then moves the freight by rail from Whittier to Seward, Anchorage, and Fairbanks.

The Alaska Railroad competes in the marketplace with Sea-Land and others for the interstate transportation of

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[2]The Alaska Railroad is owned and operated by the federal government. (43 U.S.C.A. §§ 975-975g (West Supp. 1981)). In 1966 Congress vested responsibility for running the Railroad in the Department of Transportation ("DOT") (49 U.S.C.A. § 1655(i) (1976)). The Secretary of DOT, in turn, has placed responsibility for the operation of the Railroad in the Federal Railroad Administration. ("Railroad Administration").

[3]Hydro-Train is a subsidiary of Crowley Maritime Corporation ("Crowley"), a private corporation.

commercial freight. The Railroad performs no functions, governmental or otherwise, that its privately owned competitors do not also perform.

Sea-Land filed suit on May 21, 1980, in the United States District Court for the District of Columbia against the Alaska Railroad and Hydro-Train pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C.A. §§ 15 and 26 (West Supp. 1981)),[4] seeking damages and injunctive relief for continuing violations of Sections 1 and 2 of the Sherman Act (15 U.S.C.A. §§ 1 and 2 (West Supp. 1981)). Sea-Land's complaint alleged that the Alaska Railroad and Hydro-Train have combined and conspired to restrain trade, and have conspired and attempted to monopolize the Alaska trade. Specifically, Sea-Land alleged that the Railroad and its co-conspirators have violated the Sherman Act by (1) entering into exclusive dealing contracts with major shippers in the Alaska trade which preclude Sea-Land from an opportunity to compete for the business of these shippers; (2) entering into tying arrangements requiring tenants on lands owned by the Railroad to ship their cargo via the Railroad rather than with Sea-Land and others, as a condition of obtaining a lease; and, (3) attempting to monopolize the trade by engaging in the acts stated above and by charging predatory rates.

The District Court did not address the alleged antitrust violations on the merits. Instead, on June 10, 1980, it dismissed Sea-Land's action as to the Alaska Railroad and the agencies and officials responsible for the Railroad's administration, with prejudice, on the ground of

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[4]Sea-Land also named Crowley, DOT and its Secretary, the Railroad Administration and its Administrator, and the Manager of the Alaska Railroad as defendants.

sovereign immunity.[5] Pursuant to 28 U.S.C.A. § 1291 (1966), Sea-Land appealed the dismissal to the United States Court of Appeals for the District of Columbia Circuit.

The District of Columbia Circuit affirmed the District Court's order on July 27, 1981, using an entirely different and equally faulty analysis. The Court of Appeals held that sovereign immunity does not bar Sea-Land's complaint, at least insofar as Sea-Land seeks equitable relief. The Court of Appeals concluded, however, that the Alaska Railroad is not a "person" as that word is used in the Sherman Act. That line of analysis was irrelevant because the Sherman Act does not say that only "persons" (however broadly or narrowly the word may be defined) can be Sherman Act defendants. Nevertheless, the Court of Appeals held that, since the United States is not a "person" that can sue for treble damages under Section 4 of the Clayton Act, a federal entity cannot be sued for violating the Sherman Act.

ARGUMENT FOR ALLOWANCE OF WRIT

The important question presented by this case is whether a purely commercial entity engaged in interstate commerce can avoid liability under the Sherman Act simply because it is owned and operated by the United States rather than by a private party. Reversal of the

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[5] The District Court further ordered a dismissal without prejudice as to the private defendants, Hydro-Train and Crowley. The court found that, under the doctrine of primary jurisdiction, Sea-Land's dispute with the private parties should be pursued, initially, before the Interstate Commerce Commission. The issue of primary jurisdiction was not before the Court of Appeals, and is not relevant to this Petition.

Court of Appeals decision is essential if the Sherman Act is to continue its charter to promote "free and unfettered competition as the rule of trade."[6] When the United States dons the cap of a proprietor and enters the nation's marketplace, there are no judicial remedies available to its competitors or to consumers injured by its anti-competitive conduct unless the government is required to obey its own laws.

The Court of Appeals decision should be reviewed and reversed because it misconstrues applicable Supreme Court decisions and Congressional intent, and because it conflicts with decisions of the Supreme Court that immunity from the antitrust laws must be specifically expressed by Congress.

I.

THE DECISION OF THE COURT OF APPEALS MISCONSTRUES APPLICABLE SUPREME COURT DECISIONS AND CONGRESSIONAL INTENT

The Supreme Court has never directly ruled on the question of whether federal government instrumentalities such as the Alaska Railroad may be Sherman Act defendants. In reaching the contrary conclusion, that such instrumentalities may not be sued for Sherman Act violations, the Court of Appeals relied upon a mistaken interpretation of this Court's decision in *United States v. Cooper Corp.*, 312 U.S. 600 (1941), and drew a completely inappropriate inference from a later Congressional amendment to the Clayton Act. The teachings of this Court, as well as the simple message of the Sherman Act, mandate that commercial entities owned and operated by

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[6] *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

the government behave in the same competitive manner as required of all others in the marketplace.

In *Cooper*, "[t]he precise question for decision" was whether, by the use of the phrase "any person," in what is now Section 4 of the Clayton Act,[7] "Congress intended to confer upon the United States the right to *maintain* an action for treble damages against a violator of the Act." (312 U.S. at 604) (emphasis added). Recognizing that the United States has three potent weapons for enforcing the Sherman Act—namely, criminal prosecution, injunction, and seizure of property—the Supreme Court concluded that Congress had not intended also to give the United States the remedy of a civil action for treble damages.

In this case, the Court of Appeals incorrectly read this Court's *Cooper* opinion to mean that the Supreme Court "apparently assumed the United States was not exposed to liability under the Sherman Act,"[8] for treble damages, single damages, or injunctive relief. Justice Black unequivocally dispelled any such assumption in his dissent: "That question is not before us and need not be decided." (312 U.S. at 619 n.5)

No subsequent Supreme Court decisions have given *Cooper* the interpretation applied by the District of Columbia Court of Appeals, in this case, that the United States cannot be a Sherman Act defendant. All *Cooper* held was that the United States cannot be a treble damage plaintiff.

Even assuming, for the sake of argument, that the word "person" never includes a commercial entity of

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[7] Section 4 of the Clayton Act (15 U.S.C.A. § 15 (West Supp. 1981)) supersedes Section 7 of the Sherman Act.

[8] Slip Op., at 6a (Appendix A).

the United States, the Court of Appeals analysis remains incorrect because the meaning of "person" is irrelevant to the issue of who can be sued. Congress declared illegal "*every* contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade," not just those created by private persons.[9] The Court of Appeals incorrectly added its own judicial gloss to the Sherman Act when it described the statute as prohibiting "contracts, combinations, or conspiracies in restraint of trade or commerce . . . *by any 'persons.'*" (*See* Slip Op., at 4a-5a, Appendix A). The Court of Appeals was plainly wrong. The antitrust laws, insofar as they are material here, employ the word "person" for three purposes only: (1) to define which entities are *criminally liable* (15 U.S.C.A. §§ 1, 2, 3 (West Supp. 1981)); (2) to give "any person" a private right of action *to sue for treble damages* (15 U.S.C.A. § 15 (West Supp. 1981)); and (3) to give "any person" a private right of action *to sue for injunctive relief* (15 U.S.C.A. § 26 (West Supp. 1981)). The antitrust laws allow private suits for treble damages against any "defendant" (15 U.S.C.A. § 15 (West Supp. 1981)) and suits for injunctive relief against any "party." (15 U.S.C.A. § 26 (West Supp. 1981).)

Under the statutory scheme of the Sherman Act and the rationale of *Cooper*, an important and proper distinction exists between the United States as a "person" not allowed to sue for treble damages because it has "potent" alternative law enforcement remedies, and the United States as a "defendant" liable for antitrust violations arising out of its proprietary activities in the commercial marketplace. The Court of Appeals' expansive interpretation of *Cooper* is plainly erroneous. *Cooper* does not

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[9] 15 U.S.C.A. § 1 (West Supp. 1981) (emphasis added).

stand for the proposition that the United States cannot be sued under the Sherman Act. Simply, it stands for the proposition that the United States cannot sue for treble damages under the Sherman Act.

Congress responded to the specific holding of *Cooper* by enacting Section 4A of the Clayton Act (15 U.S.C.A. § 15a (West Supp. 1981)) to allow the United States to sue for actual, but not treble, damages when it is injured in its business or property. The Court of Appeals incorrectly reasoned that "the legislature's total silence on the situation of the United States as a Sherman Act defendant" suggests that the United States is not amenable to suit.[10] The Court of Appeals misconstrued the intent of Congress. Section 4A of the Clayton Act, like *Cooper*, simply deals with whether the United States can sue for actual or treble damages for Sherman Act violations.[11] In fact, the Court of Appeals recognized this in its opinion when it stated that Congress enacted Section 4A only in response "to the precise question raised in *Cooper Corp.*",[12] *i.e.*, whether the United States could sue for treble damages for Sherman Act violations.

Neither Section 4A of the Clayton Act nor the *Cooper* holding furnish support for the notion that the United States is not subject to suit for Sherman Act violations. Congress enacted the Sherman Act to prevent restraints of free competition in business and commercial trans-

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[10] Slip Op., at 6a (Appendix A).

[11] See S. Rep. No. 619, 84th Congress, 1st Session, *reprinted in* [1955] U.S. Code Cong. & Ad. News 2328; H. Rep. No. 422, 84th Congress, 1st Session (1955); 101 Cong. Rec. 5129 (1955).

[12] Slip Op., at 5a (Appendix A).

actions which tend to restrict production, raise prices, or otherwise control the market.[13] All who compete in the marketplace must answer to the same standards. Surely, the Sherman Act is not an economic charter of freedom for everyone except the federal government.

II.

THE DECISIONS OF THE COURTS BELOW CONFLICT WITH DECISIONS OF THE SUPREME COURT THAT IMMUNITY FROM THE ANTITRUST LAWS MUST BE SPECIFICALLY EXPRESSED BY CONGRESS

The Court of Appeals correctly determined that "[i]nsofar as appellants seek equitable relief, we conclude that sovereign immunity does not bar the way." (Slip Op., at 2a, *citing* 5 U.S.C.A. § 702 (1977)). The Court of Appeals did not expressly consider whether sovereign immunity bars a suit for treble damages against the Alaska Railroad because it held incorrectly as a matter of substantive law that the United States was not a "person" subject to the Sherman Act for any purpose.[14]

The sole question that remains is whether sovereign immunity bars a suit for treble damages arising from Sherman Act violations. This question was correctly answered by the analysis of *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). A federal agency acting in a proprietary capacity is subject to suit for treble damages for Sherman

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[13]See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940).

[14]Although the Court of Appeals did not expressly consider the issue of whether sovereign immunity bars suit for treble damages, the issue is one which this Court will have to address in deciding whether or not Sea-Land's lawsuit was improperly dismissed.

Act violations unless there is a "definite, clearly expressed, specific intent of Congress to rule out the applicability of the antitrust laws." (444 F.2d at 947). Congress has made no such exemption for the Alaska Railroad.

Unable to reconcile *Hecht* with its incorrect application of this Court's *Cooper* decision and its misinterpretation of the significance of the subsequent enactment of Section 4A, the District of Columbia Circuit attempted to distinguish *Hecht*. It misread *Hecht* as involving an entity—although created by Congress—"more closely resembling a municipal agency than a United States instrumentality."[15] However, the *Hecht* court made no such distinction and treated the government defendant in *Hecht* as a federal entity.[16] The controlling factor for the *Hecht* court was that Congress enacted both the agency's underlying enabling statute and the antitrust laws.[17] The applicability of the Sherman Act to the federal defendant in *Hecht* turned upon reconciliation of the two acts of Congress.

The same controlling factor applies here. In reconciling the Sherman Act and subsequent legislation establishing the Alaska Railroad, the proper inquiry is to what extent Congress has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws. Citing opinions of this Court, the *Hecht*

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[15] Slip Op., at 7a (Appendix A).

[16] 444 F.2d at 935, 938, 942.

[17] 444 F.2d at 942. The state-action doctrine articulated in *Parker v. Brown*, 317 U.S. 341 (1943), was discussed in *Hecht* only because both sides "relied upon most strongly" that doctrine. 444 F.2d at 936.

court reasoned that "Immunity from the antitrust laws 'is not lightly implied' ".[18]

At no time in the proceedings below has the Alaska Railroad even argued that Congress in passing the Railroad's enabling act intended that the Sherman Act not apply to the Railroad's activities. In the absence of an express exemption, the Sherman Act is not displaced by subsequent legislation concerning an area of commercial activity unless it appears that the policies of the antitrust laws and the subsequent legislation are plainly opposed.[19] Under these criteria, federal agencies authorized by Congress to engage in proprietary activities in competition with private companies are not exempted from liability for treble damages under the Sherman Act merely by virtue of their status as government entities.

A suit against a federal agency for unlawful conduct arising from its proprietary activities does not interfere with the performance of governmental functions.[20] Thus, the shield of sovereign immunity must certainly be removed where the actions of such government instrumentalities violate policies basic to our social structure. The Sherman Act is such a basic policy,

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[18] *Hecht v. Pro-Football, Inc., supra,* 444 F.2d at 935, *citing, United States v. First City National Bank,* 386 U.S. 361, 368 (1967), and *California v. Federal Power Commission,* 369 U.S. 482, 485 (1962).

[19] *United States v. Philadelphia National Bank,* 374 U.S. 321, 350-351 and n.28 (1963) (collecting cases). The guiding principle is to reconcile the two statutory schemes so as to give effect to both rather than holding one completely ousted. *Silver v. New York Stock Exchange,* 373 U.S. 341, 357 (1963).

[20] If accepted by the Court, Sea-Land's argument with respect to sovereign immunity would only apply in those few situations where the government is acting in a truly proprietary capacity rather than a governmental one.

because it is a true "economic Magna Carta."[21] The need for enforcement of its mandate is all the more compelling where the government chooses to enter the arena of private competition and would compel its rivals to obey the same laws it seeks to violate with impunity.[22] There is no reason either in law or in policy to allow proprietary government agencies, such as the Alaska Railroad, to violate the Sherman Act without giving their competitors and their consumers a forum, both legal and equitable, in which to seek redress of their grievances.

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[21] *United States v. Topco Associates*, 405 U.S. 596, 610 (1972).

[22] The government has never denied the essential factual allegations in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of ceriorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2097

SEA-LAND SERVICE, INC., ET AL., APPELLANTS

v.

THE ALASKA RAILROAD, ET AL.

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 80-01277)

Argued May 21, 1981

Decided July 27, 1981

J. Peter Shapiro, with whom *Peter D. Byrnes* and *Anne E. Mickey* were on the brief, for appellants.

John D. Bates, Assistant United States Attorney, with whom *Charles F. C. Ruff*, United States Attorney, *Royce C. Lamberth* and *Kenneth M. Raisler*, Assistant United States Attorneys, were on the brief, for Federal appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Michael Joseph entered an appearance for Crowley Maritime Corp., et al., appellees.

Before: WRIGHT, MACKINNON and GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: This appeal presents the question whether the Alaska Railroad (ARR), an entity wholly owned and operated by the United States, is amenable to suit for treble damages and injunctive relief under the Sherman Act for alleged anticompetitive conduct. Appellants Sea-Land Services, Inc., and its wholly owned subsidiary, Sea-Land Freight Services, Inc., assert that ARR and a private corporation, Alaska Hydro-Train Corp., are engaged in a conspiracy to drive out competition and monopolize the Alaska trade. On the ground of sovereign immunity, the district court dismissed the action as to ARR and the United States agencies and officials responsible for ARR's supervision.[1] We affirm the district court's order dismissing the case against these defendants, although our analysis differs in part from that of the district judge.

Insofar as appellants seek equitable relief, we conclude that sovereign immunity does not bar the way. *See* 5 U.S.C. § 702, *as amended by* Pub. L. No. 94-574, 90 Stat. 2721 (1976) (eliminating sovereign immunity defense in all actions for specific, nonmonetary relief against a United States agency or officer acting in an official capacity). However, we further conclude that Congress did not place the United States or its instru-

[1] The district court further ordered a dismissal without prejudice as to the private defendants, Alaska Hydro-Train and its parent corporation. The court found that, under the doctrine of primary jurisdiction, the core of that dispute should be pursued, initially, before the Interstate Commerce Commission. That ruling is not before us for review.

mentalities under the governance of the Sherman Act. For that reason, we hold that appellants may not maintain this action against the Alaska Railroad and the United States agencies and officers that supervise its operation.

I

The district court stated tersely that § 702 of the Administrative Procedure Act "does not afford [appellants] a statutory cause of action" in this case. *Sea-Land Service Inc. v. Alaska Railroad*, 1980-2 Trade Cas. ¶ 63,481, at 76,523-24 (D.D.C. 1980). That statement bears elaboration. Section 702 of the Administrative Procedure Act, *as amended by* Pub. L. No. 94-574 (1976), provides in pertinent part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; . . . .

The Judiciary Committees of both Houses, in their reports on the 1976 amendment, identified as the measure's clear purpose "elimina[tion of] the sovereign immunity defense in *all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity." S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976) (emphasis added); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976) (emphasis added). The legislative history plainly reveals a congressional intent to strengthen Government accountability and dispel the confusion, uncertainty, and unfairness sovereign immunity defenses generated. *See* S. Rep. No. 996 at 7; H.R. Rep. No. 1656 at 8. While

the amendment "with[drew] the defense of sovereign immunity in actions seeking relief other than money damages," Congress intended no alteration in existing law governing the recovery of money damages against the United States. S. Rep. No. 996 at 4; H. Rep. No. 1656 at 4-5. Were sovereign immunity our sole concern, therefore, to the extent that appellants seek injunctive relief, we would hold the named United States agencies and officials answerable in this action.

Although amended § 702 eliminates the defense of sovereign immunity in actions for specific, nonmonetary relief,[3] the amendment does not mean that all such actions, in which a sovereign immunity defense formerly would have required dismissal, now will be decided on the merits. By its terms, amended § 702 does not affect "the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." We hold that such a ground bars this action. The Sherman Act, we conclude, does not expose United States instrumentalities to liability, whether legal or equitable in character, for conduct alleged to violate antitrust laws.

II

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, which appellants allege have been violated by the Alaska Railroad and its supervising United States agencies and officials, prohibit contracts, combinations, or conspiracies in restraint of trade or commerce and monopoli-

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[3] Jaffee v. United States, 592 F.2d 712, 718-19 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979), relying on the relevant legislative history, firmly rejects in an illuminating discussion the narrow interpretation of the 1976 amendment to § 702 that the Government appears to urge upon us in this action. *See* Brief for Appellees at 27-28. *See also* Sheehan v. Army and Air Force Exchange Service, 619 F.2d 1132, 1139 (5th Cir. 1980) (following *Jaffee*). *But see* Estate of Watson v. Blumenthal, 586 F.2d 925, 932-34 (2d Cir. 1978) (alternative holding).

zation or attempts or conspiracies to monopolize trade or commerce by any "persons." The terms "person" or "persons" are defined for purposes of the Sherman Act in 15 U.S.C. § 7 to include corporations and associations existing under or authorized by state or federal law. In *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the Supreme Court held that the United States does not qualify as a "person" within the compass of the statutory provision (now 15 U.S.C. § 15) authorizing an injured "person" to maintain an action for treble damages against an alleged violator of the antitrust laws. The Court pointed out that if the United States qualified as a "person" entitled to maintain a treble damage action, it would also qualify as a "person" subject to Sherman Act liability. *Id.* at 606.

Congress ultimately responded to the precise question raised in *Cooper Corp.* In 1955, § 4A was added to the Clayton Act[3] authorizing the United States to sue alleged antitrust law violators for actual, but not treble, damages. Although Congress was well aware of the view indicated by the Court in *Cooper Corp.* that Congress had not described the United States as a "person" for Sherman Act purposes,[4] Congress addressed only the

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[3] 15 U.S.C. § 15a, Pub. L. No. 84-137, 69 Stat. 282 (1955).

[4] *See, e.g.*, 101 Cong. Rec. 5129 (1955) (Remarks of Rep. Celler) ("[t]he United States is deemed not a person and thus cannot sue. The word person is the key word in the statute. Only a 'person' presently can sue.").

Appellants suggest that Georgia v. Evans, 316 U.S. 159 (1942), and Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978), confine the significance of *Cooper Corp.* to the precise holding that the United States cannot sue for treble damages. We believe that the legislative history of the 1955 alteration confirms the congressional understanding that *Cooper Corp.* implied a broader position—that Congress had not identified the United States as a "person" capable of maintaining a Sherman Act treble damage action, or as a "person" amenable to suit under the Act. Cf. State of New Mexico v. American

direct holding in that case—the ruling that the United States was not authorized to proceed as a Sherman Act treble damage action plaintiff. The 1955 alteration simply added an action for single damages to the Government's potent antitrust enforcement arsenal, which already included criminal prosecutions under §§ 1-3 of the Sherman Act, 15 U.S.C. §§ 1-3, proceedings for injunctive relief under § 4, 15 U.S.C. § 4, and seizure of property under § 6, 15 U.S.C. § 6.

Appellants stress the broad policy of the Sherman Act and ask us to develop from that policy coverage of the United States and its instrumentalities as defendants. Given the discrete consideration Congress gave to the situation of the United States, after the decision in *Cooper Corp.*, as a Sherman Act damage action plaintiff, and the legislature's total silence on the situation of the United States as a Sherman Act defendant, we decline to take the step appellants invite. The *Cooper Corp.* Court apparently assumed the United States was not exposed to liability under the Sherman Act, subsequent case law is consistent with that view,[5] Congress had a clear occasion to address the issue in 1955 but failed to do so. Under these circumstances, we are unwilling "to engraft

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Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974) (states, acting in sovereign character, although they may maintain antitrust actions, are invulnerable to federal antitrust liability). *Accord*, Feldman v. Gardner, No. 78-2235 (D.C. Cir. July 23, 1981).

[5] *See, e.g.*, Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., Inc., 632 F.2d 680 (7th Cir. 1980) (Robinson-Patman Act held inapplicable to purchases by military exchanges); Webster County Coal Corp. v. TVA, 476 F. Supp. 529 (W.D. Ky. 1980) (TVA, as instrumentality of federal government, is exempt from liability under the antitrust laws).

Except for Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), discussed *infra*, appellants cite no cases suggesting that federal agencies are subject to antitrust liability.

on [the] statute additions . . . the legislature might or should have made." *Cooper Corp., supra*, 312 U.S. at 605. *Cf. Texas Industries, Inc. v. Radcliff Materials, Inc.*, 101 S.Ct. 2061, 2070 (1981) (issue of right to contribution among antitrust defendants "is a matter for Congress, not the courts, to resolve"). Accordingly, we hold that the United States, its agencies and officials, remain outside the reach of the Sherman Act.

Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), on which appellants primarily rely, involved an instrumentality of the District of Columbia, the District of Columbia Armory Board, an entity more closely resembling a municipal agency than a United States instrumentality. Pursuant to its authority to legislate for the District, Congress provided for the construction of the Robert F. Kennedy Stadium and created the Armory Board to operate the facility. *Hecht* presented a challenge under the antitrust laws to a provision in the Board's thirty-year lease of the stadium to the Washington Redskins. The provision alleged to contravene the Sherman Act precluded rental of the stadium during the term of the Redskins' lease to any other professional football team. In holding that the lease was subject to the antitrust constraints usually applied to contracts between private parties, this court focused on prior decisions involving governmental action by a state or municipal entity. *Id.* at 936-42.[6]

In contrast to the Supreme Court's ruling in *Cooper Corp., supra*, that the United States is not a "person" authorized by Congress to maintain a treble damage action under the Sherman Act, the Court ruled the very next year that states could sue for treble damages under the Act. *Georgia v. Evans*, 316 U.S. 159 (1942). *See*

[6] The court also considered decisions involving alleged exemption of federally-regulated private industries from antitrust laws. *Id.* at 942-44.

also Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906) (local government entity may maintain Sherman Act treble damage action). The Court did not suggest in those decisions, as it did with respect to the United States in *Cooper Corp.*, 312 U.S. at 606, that states or municipalities stand wholly outside the reach of the Sherman Act with respect to conduct in disregard of antitrust restraints. *Cf. City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (cities are subject to antitrust liability). We believe District of Columbia instrumentalities functionally similar to local authorities are properly ranked with other municipal entities in this context. *See Sabin v. Berglund*, 585 F.2d 955, 960 (10th Cir. 1978); *cf. District of Columbia v. Woodbury*, 136 U.S. 450 (1890) (District of Columbia agencies treated as municipal instrumentalities for tort liability purposes). While *Hecht* stands as this court's precedent regarding District of Columbia agencies such as the Armory Board, we hold that *Hecht* does not supply analysis appropriate in a case in which the activities of a United States instrumentality are at issue.

Appellants urge that it is anomalous and unfair for a United States instrumentality to escape the regimen of antitrust laws the Government would compel its rivals in commerce to obey. Reply Brief at 2, 13. As appellants acknowledge, however, redress for their alleged grievance entails a policy judgment. We believe a court should not infer such a judgment from the silence of Congress. Congress spoke directly and with precision to the institution of suit by the United States under the Sherman Act. Similarly clear statement subjecting the United States to a private action for violation of the Sherman Act should precede court application of the principle appellants press, that United States entities operating alongside private companies "should be required to abide by the same laws regulating commerce as everyone else." *Id.* at 2.

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For the foregoing reasons, we affirm the order of the district court granting the motion of the Alaska Railroad and the United States agencies and officials named in the complaint to dismiss with prejudice the claims asserted against them.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1277

SEA-LAND SERVICE, INC., *et al.*,
Plaintiffs,

v.

THE ALASKA RAILROAD, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs Sea-Land Service, Inc. and Sea-Land Freight Services, Inc. have brought this action against two private corporations[1] and three federal agencies[2] and their chief officers, for alleged violations of the federal antitrust laws,[3] the Federal Tort Claims Act, and general federal

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[1]Defendant Alaska Hydro-Train Corporation, a subsidiary of defendant Crowley Maritime Corporation, are the two private defendants.

[2]The Alaska Railroad, the Federal Railroad Administration, the Department of Transportation and the respective chief officers of each of these federal agencies collectively constitute the "federal defendants."

[3]This action is brought under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to obtain damages for and injunctive relief against violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

law. The federal defendants have moved pursuant to 12(b), Fed. R. Civ. P. to dismiss this action, arguing that sovereign immunity bars suit against the federal defendants and that jurisdiction over plaintiffs' claims against all defendants properly lies with the Interstate Commerce Commission and not with this court.

I. *Sovereign Immunity*

It is unquestioned that the United States cannot be sued without its consent. *Dugan v. Rank*, 372 U.S. 609 (1963). The doctrine of sovereign immunity extends in full to the departments and agencies of the United States. *Blackmar v. Guerre*, 342 U.S. 512, 515 (1952). Thus, for the United States to be sued, Congress must waive immunity from suit. *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). We find no waiver of sovereign immunity in the legislation authorizing and empowering the construction of the Alaska Railroad, the Alaska Railroad Act of March 12, 1914, as amended, 43 U.S.C. §§ 975-975g. We find that the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 *et seq.*, although a waiver of sovereign immunity, does not provide a statutory cause of action for plaintiffs in the instant action under the facts presently before us. Similarly, we also find that § 702 of the Administrative Procedures Act, 5 U.S.C. § 702, does not afford plaintiffs a statutory cause of action under the facts presently before us.

Plaintiffs' main defense against the sovereign immunity bar is that the federal antitrust laws constitute Congressional consent to sue the United States for violations of those laws. In making this argument, plaintiffs place primary reliance on this Circuit's Court of Appeals decision in *Hecht v. Pro-Football, Inc.*, 444 F.2d 931

(D.C. Cir. 1971). The *Hecht* case involved a suit by private individuals against the Washington Redskins, the District of Columbia Armory Board, and others, alleging that a provision in a lease between the Armory Board and the Redskins providing that the Redskins were the only football team which could use Robert F. Kennedy Stadium during the 30-year term of the lease violated the Sherman Act. The court found that the Armory Board, which was created by Congress to construct, operate, and maintain the stadium, was not exempt from the federal antitrust laws because there was no clearly expressed intent of Congress to so exempt the Board. Plaintiffs here argue that the Armory Board was a federal entity, since it was created by Congress, and that *Hecht* stands for the proposition that a federal entity is *not* immune from suit under the antitrust laws unless a specific statutory intent to exempt the entity appears. We cannot agree.

At the outset, we make two observations. The first is that the interpretation of *Hecht* which plaintiffs urge conflicts with a long line of Supreme Court and lower federal court cases holding, under the doctrine of sovereign immunity, that the United States is immune from suit unless the Congress has consented to such suit. The second is that, *Hecht* aside, plaintiffs cannot draw our attention to any case where a court has held a federal entity subject to suit under the antitrust laws, and we can find none.

This is not surprising. As the Supreme Court has noted:

> It has been recognized, at least since the landmark decision of this Court in *Standard Oil v. United States*,[4] that the Sherman Act forbids only those

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[4] 221 U.S. 1, at 51-52 (1910).

> trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations." Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out.

Eastern Railroad Presidents Conference, et al. v. Noerr Motor Freight, Inc., et al., 365 U.S. 127, 135-36 (1960). In *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the Supreme Court said that "[i]t is clear under *Noerr* that Phillips could not collect any damages under the Sherman Act for any injury which it suffered from the action of the Secretary of Labor." *Id.* at 671.

Lower federal courts have also found that federal officials and federal entities are immune from suit under the antitrust laws. For example, the Fifth Circuit held that the Administrator of the Rural Electrification Administration, a federal entity, was immune from suit under the antitrust laws. *Alabama Power Company v. Alabama Electric Cooperative, Inc., et al.*, 394 F.2d 672 (5th Cir. 1968). The court in that case flatly held that "it is settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action.[5] *Id.* at 675. For other cases

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[5]Contrary to plaintiffs' assertion, *Alabama Power* was not overruled by *Woods Exploration & Producing, Inc. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), where the court said that "it is not every governmental act that points a path to an antitrust shelter." *Id.* at 1294. The *Alabama Power* case involved a suit against a federal entity, which the court found barred by the doctrine of sovereign immunity. The *Woods* case involved the

[footnote continued]

holding that federal entities and federal officials are exempt from suit under the federal antitrust laws, *see Sabin v. Berglund*, 585 F.2d 955 (10th Cir. 1978); *Webster County Coal Corp. v. Tennessee Valley Authority*, 476 F. Supp. 529 (W.D. Ky. 1979); *Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co.*, 479 F. Supp. 281 (C.D. Ill. 1979); *Crocker v. Padnos*, 483 F. Supp. 229 (D. Mass. 1980).

Against this background, we cannot agree with plaintiffs reading of the *Hecht* case. We believe that the only plausible reading of this case was that the D.C. Armory Board was treated by the court as a *state* rather than a federal entity and that this case is another in the long line of cases dealing with state immunity from suit under the federal antitrust laws. *See Parker v. Brown*, 317 U.S. 341 (1943); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 48 U.S.L.W. 4238 (Mar. 4,

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impact of state regulation on *private parties'* immunity from the antitrust laws. The issue in *Woods* was whether a state regulatory agency's actions, which harmed plaintiff, exempted private party defendants from liability under the federal antitrust laws when the state action was the result of false information filed with the state agency by private party defendants. It was in this context that the court said that not every governmental act points a path to an antitrust shelter and refused to find the private party defendants immune from the reach of the antitrust laws. The fact that *Woods* involved a state regulatory agency rather than a federal entity further distinguishes *Woods* from *Alabama Power*. Nevertheless, were a federal regulatory agency involved, it need hardly be said that a holding that a federal agency cannot exempt a private party from liability under the antitrust laws unless that federal agency is specifically empowered to do so has nothing to do with whether a federal entity *may be subject to suit* under the federal antitrust laws. For cases treating this nonanalogous situation, *see Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *United States v. First National Bank and Trust Company of Lexington*, 376 U.S. 665 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

1980). This reading is supported by the fact that the *Hecht* court never held that the Armory Board was a federal entity, and in fact said that the Armory Board "is somewhat similar to a state governmental agency." *Hecht v. Pro-Football, Inc., supra,* at 936. Furthermore, although the Armory Board was created by Congressional statute, it is reasonable to treat the Armory Board as a state agency, since when enacting laws governing the District of Columbia, the Congress acts similarly to a state legislature. At least two other federal courts have specifically treated *Hecht* as not dealing with a federal entity. *See Sabin v. Berglund, supra,* at 960;[6] *Champaign-Urbana News Agency v. J. L. Cummins News Co., supra,* at 286.[7]

For these reasons, we cannot read the *Hecht* case as holding that the federal antitrust laws constitute a Congressional consent to sue the United States for alleged violation of these laws. Furthermore, under the facts herein, neither the Federal Tort Claims Act nor the Administrative Procedure Act operate to provide such immunity. Because we can find no waiver of sovereign immunity allowing plaintiffs to bring this action against

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[6] "This was, however, a case which did not involve a federal agency. . . . This case pretty much stands alone because the Court was faced with an excessive exercise of authority, and the body which was exercising it was more of a municipal corporation than a federal government agency or department."

[7] "AAFES is not a federal agency with a status equivalent to the District of Columbia Armory Board. Rather, AAFES enjoys a higher and more protected status for purposes of sovereign immunity than does any District of Columbia agency. AAFES is truly a federal agency, while for purposes of sovereign immunity, the District of Columbia Armory Board is more like a state agency or instrumentality."

the federal defendants, we find this action must be dismissed as to the federal defendants.

II. *Primary Jurisdiction*

Plaintiffs alleged that defendants violated the antitrust laws in four basic respects: (1) by entering exclusive dealing contracts which give shippers a special low rate in exchange for agreeing to ship a certain annual volume of goods via the Alaska Railroad and Alaska Hydro-Train; (2) establishing predatory, below cost rates to induce shippers to enter into the exclusive dealing contracts; (3) conducting a *per se* illegal boycott by entering exclusive dealing contracts; and (4) entering *per se* illegal tying agreements requiring businesses seeking to lease "indispensible land" from the Alaska Railroad to ship goods via the Alaska Railroad and Alaska Hydro-Train. Plaintiffs seek an injunction preventing defendants from effectuating two "exclusive dealing contracts" already signed and an injunction preventing defendants from soliciting and entering any further "exclusive dealing contracts" similar to the two already signed. In addition, plaintiffs seek monetary damages.

The federal defendants argue that this court is without jurisdiction to enter any injunction preventing defendants from effectuating the existing "exclusive dealing contracts" because this in effect would be a judicially-ordered rate suspension, and rate suspensions are within the exclusive jurisdiction of the Interstate Commerce Commission. The federal defendants also argue that this court now lacks jurisdiction over plaintiffs' remaining claims because of the doctrine of primary jurisdiction. We do not reach the question of exclusive jurisdiction, because we find that this action is at least within the primary jurisdiction of the ICC.

The doctrine of primary jurisdiction was described by the Supreme Court in *Far East Conference v. United States,* 342 U.S. 570 (1952). "The Court [referring to *United States Navigation Company v. Cunard Steamship Co.,* 284 U.S. 474 (1932)] thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Id.* at 574.

Under the doctrine of primary jurisdiction the action is first referred to the administrative agency with statutory jurisdiction over some of the issues involved in the court challenge. A further statement of the purposes underlying the doctrine was provided by the Supreme Court in *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289 (1973), an antitrust action involving the Commodity Exchange Act. There the court found that primary jurisdiction required that the dispute first be presented to the Commodity Exchange Commission for three reasons: (1) that it will be essential for the antitrust court to determine whether the Commodity Exchange Act or any of its provisions are incompatible with the maintenance of an antitrust action; (2) that some facts of the dispute between Ricci and the Exchange are within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promises to be of material aid in resolving the immunity question. *Id.* at 302. As the court in *Ricci* noted, that case presented "issues of fact and questions about the scope, meaning, and significance" of agency rules, and "[t]hese are matters that should be dealt with in the first instance by those especially familiar with the customs and practices of the

industry and of the unique marketplace involved in this case." *Id.* at 305. The *Ricci* court reiterated the view "that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern." *Id.* at 305-06, quoting *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 498 (1958).

In this action, plaintiffs originally sought the Commission's jurisdiction under 49 U.S.C. § 10707 by requesting the Commission to suspend or investigate the contract rates at issue here. In doing so, the plaintiffs made considerable reference to alleged antitrust violations. The Commission declined to investigate or suspend the rates, and this Circuit's Court of Appeals subsequently denied plaintiffs' motion for a temporary restraining order and preliminary injunction to enjoin the contract rates. This appeal is still pending. Plaintiffs, however, have the option to initiate a complaint proceeding before the Commission, pursuant to 49 U.S.C. § 11701, regarding the contract rates complained of here. In such a Commission proceeding, the Commission is empowered to consider allegations of anticompetitive behavior in the context of its obligation to take into account the anticompetitive effect of rates subject to its jurisdiction. We find that plaintiffs should pursue such a complaint proceeding.

Furthermore, we find that by pursuing a complaint proceeding before the Commission in order to test the validity of the rates at issue here, the Commission will be given the opportunity to apply its specialized knowledge, expertise and fact-finding abilities to an issue entrusted to their jurisdiction by Congress. This is appropriate, for we find that the essence of plaintiffs' antitrust violations

is the "exclusive dealing contracts" entered by defendants, and we find that the essence of these contracts is what plaintiffs allege to be predatory, below cost rates. As the Court in *Ricci* held, it is sufficient that *some* of the issues raised in the antitrust complaint be within the statutory jurisdiction of the agency for the doctrine of primary jurisdiction to apply. Here, we find that the issue of rates is within the statutory jurisdiction of the agency,[8] and we find that this issue is at the heart of plaintiffs' antitrust allegations. As this Circuit's Court of Appeals has recently held in a similar situation, "[l]itigating this railroad dispute in the first instance in the agency that regularly deals with such disputes will, in any event, 'prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to [these] particular circumstances.'" *Southern Railway Company v. Seaboard Coast Line Railroad Company, et al.*, No. 78-1421 (D.C. Cir. June 6, 1980), quoting *Federal Maritime Board v. Isbrandtsen Co., supra*, at 498-99. We also find that allowing prior agency adjudication of this dispute will greatly assist the antitrust court in making decisions involving accommodation of antitrust policy to regulatory policy.

We conclude that dismissal, rather than a stay of this action, is appropriate under the circumstances. When the doctrine of primary jurisdiction applies, the Supreme Court has held that "[d]ismissal rather than a stay has been approved where there is assurance that no party is prejudiced thereby." *United States v. Michigan National*

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[8] See Findings of Fact and Conclusions of Law, at 4-5, entered this day in this action.

Corp., et al., 419 U.S. 1, 5 (1974). *See Far East Conference v. United States, supra.* In this case, plaintiffs have suffered no past damages from the alleged antitrust violations resulting from the "exclusive dealing contracts" and there is no imminent danger of this action being barred by the statute of limitations. "We believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceeding before the [agency] and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate. Business-like procedure counsels that the . . . complaint should now be dismissed. . . ." *Far East Conference v. United States, supra,* at 577.

An order consistent with the foregoing has been entered this day.

/s/ John H. Pratt
United States District Judge

July 11th, 1980.

APPENDIX C

FULL TEXT OF STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C.A. § 1 (West Supp. 1981), provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U.S.C.A. § 2 (West Supp. 1981), provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 8 of the Sherman Act, 15 U.S.C.A. § 7 (1973), provides:

The word "person" or "persons", wherever used in section 1 to 7 of this title shall be deemed to include

corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Section 4 of the Clayton Act, 15 U.S.C.A. § 15 (West Supp. 1981), provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory

behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for purpose of delaying the litigation or increasing the cost thereof.

Section 4A of the Clayton Act, 15 U.S.C.A. § 15a (West Supp. 1981), provides:

Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit. The court may award under this section, pursuant to a motion by the United States promptly made, simple interest on actual damages for the period beginning on the date of service of the pleading of the United States setting forth a claim under the antitrust laws and ending on the date of judgement, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether the United States or the opposing party, or either party's representatives, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;

(2) whether, in the course of the action involved, the United States or the opposing party, or either party's representative, violated any applicable rule, statute,

or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings;

(3) whether the United States or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof; and

(4) whether the award of such interest is necessary to compensate the United States adequately for the injury sustained by the United States.

Section 16 of the Clayton Act, 15 U.S.C.A. § 26 (West Supp. 1981), provides:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-781

In the Supreme Court of the United States

OCTOBER TERM, 1981

SEA-LAND SERVICE, INC., ET AL., PETITIONERS

v.

THE ALASKA RAILROAD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1. The Alaska Railroad is an executive branch agency of the United States Government, currently operated by the Department of Transportation and the Federal Railroad Administration. See 43 U.S.C. 975-975g; 49 U.S.C. 1655(i); Exec. Order No. 11107, 3 C.F.R. 767 (1959-1963 Compilation); 49 C.F.R. 240.1 *et seq.* In early 1980, the Railroad and respondent Alaska Hydro-Train Corporation, a connecting water carrier, entered into contracts with two shippers under which the Railroad and Hydro-Train would provide through transportation of freight from the port of Seattle, Washington, to inland points in Alaska. Under the contracts, which were filed with the Interstate Commerce Commission, the rates specified for each shipper were contingent upon the shipper's tender of a certain volume of goods during the one year term of the contract.

Petitioners provide a water-motor carrier service that competes with respondents' water-rail service. They filed this action under the antitrust laws for damages and injunctive relief against the Railroad and Hydro-Train,[1] alleging that the Railroad engaged in illegal tying arrangements and that the contracts with the shippers were unlawful to the extent they constituted exclusive dealing arrangements and set rates at predatory levels.

The district court dismissed the complaint, holding that the federal defendants were protected by the doctrine of sovereign immunity and that the ICC had primary jurisdiction over the complaint against all the defendants. On appeal, petitioners challenged only the first of those holdings (Pet. App. 2a n.1). The court of appeals affirmed, ruling that "[t]he Sherman Act * * * does not expose United States instrumentalities to liability, whether legal or equitable in character, for conduct alleged to violate antitrust laws" (Pet. App. 4a).

2. In *United States* v. *Cooper Corp.*, 312 U.S. 600, 606 (1941), this Court, in the course of holding that the United States is not a "person" entitled to bring a civil suit for violations of the Sherman Act, concluded that it is axiomatic that the United States and its instrumentalities cannot be sued:

> The provision is that "any person" injured by violation of the Act "by any other person or corporation" may maintain an action for treble damages against the latter. It is hardly credible that Congress used the term

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[1]Along with the Railroad, the complaint named as defendants the Department of Transportation, the Federal Railroad Administration (which operates the Railroad), and the head of each defendant organization (the Secretary of Transportation, the Administrator of the Federal Railroad Administration, and the Manager of the Alaska Railroad). The complaint also named Hydro-Train's parent company, Crowley Maritime Corporation.

> "person" in different senses in the same sentence. Yet, unless it did, the United States would not only be entitled to sue but would be liable for suit for treble damages. The more natural inference, we think, is that the meaning of the word was in both uses limited to * * * individuals and corporations.

The provision to which the Court referred, Section 7 of the Sherman Act, ch. 647, 26 Stat. 210, was repealed in 1955 (see Act of July 7, 1955, ch. 283, 69 Stat. 283), but only in order to give the United States the power to sue for damages (see 15 U.S.C. 15a). As the court of appeals correctly observed (Pet. App. 5a-6a), Congress modified that aspect of the ruling in *Cooper* while leaving untouched the conclusion that the United States is not liable to suit. This is strong evidence that Congress endorsed the latter conclusion. See generally *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Flood* v. *Kuhn*, 407 U.S. 258, 283-285 (1972).[2]

The courts of appeals have consistently held that federal agencies are not subject to the antitrust laws. See, *e.g.*, *Champaign-Urbana News Agency, Inc.* v. *Cummins News Co.*, 632 F. 2d 680, 692 (7th Cir. 1980); *Sabin* v. *Berglund*, 585 F. 2d 955, 960-961 (10th Cir. 1978); *Alabama Power Co.* v. *Alabama Electric Cooperative*, 394 F. 2d 672, 675 (5th Cir.), cert. denied, 393 U.S. 1000 (1968). The Alaska Railroad, like other federal agencies, was created by Congress to promote certain policies—"to aid in the development of the agricultural and mineral or other resources of Alaska, and the settlement of the public lands therein, and

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[2]Insofar as petitioners seek damages, their claims are barred for the additional reason that the United States has not waived its sovereign immunity. Such a waiver "cannot be implied but must be unequivocally expressed." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), quoting *United States* v. *King*, 395 U.S. 1, 4 (1969).

so as to provide transportation of coal for the Army and Navy, transportation of troops, arms, munitions of war, the mails and for other governmental and public uses and for the transportation of passengers and property" (43 U.S.C. 975). See also 51 Cong. Rec. 1527 (1914) ("The main purpose of [the railroad] was to develop Alaska.") (remarks of Sen. Chamberlain). The question whether the Railroad is acting in a way that thwarts Congress's intentions—including whatever intention Congress had to promote or preserve competition—can be resolved only by reference to the Railroad's organic statutes and the policies they reflect, not in a suit brought solely under the general antitrust laws. See, *e.g.*, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 78-79 (1944).

The only authority petitioners cite in support of their position that federal agencies may be sued under the antitrust laws is the District of Columbia Circuit's earlier decision in *Hecht* v. *Pro-Football, Inc.*, 444 F. 2d 931 (1971), cert. denied, 404 U.S. 1047 (1972). Not only is an intra-circuit conflict insufficient to warrant this Court's review (see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957)), but, as the court of appeals explained, *Hecht* was a suit against "an instrumentality of the District of Columbia, * * * an entity more closely resembling a municipal agency than a United States instrumentality" (Pet. App. 7a-8a). Municipalities, of course, can sometimes be held liable under the antitrust laws. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
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DECEMBER 1981

DOJ-1981-12

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
JAN 13 1982

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1. The Memorandum for the Federal Respondents in Opposition fails to address or analyze the important question presented by this case:

> Is a purely commercial entity immune from liability under the Sherman Act simply because it is owned and operated by the federal government?

2. The federal respondents' reliance on *United States v. Cooper Corp.*, 312 U.S. 600 (1941), is misplaced. The holding in *Cooper*, which is discussed at length in the Petition for Writ of Certiorari (pp. 7-11), was simply that the United States cannot maintain an action for treble damages. *Cooper* did not decide that the United

States cannot be sued for Sherman Act violations.[1] The federal respondents have not challenged the petitioners' position that the meaning of "person" is irrelevant to the issue of who can be sued under the Sherman Act. (Petition for Writ of Certiorari, pp. 8-9).

3. The federal respondents also err in claiming that "the courts of appeals have consistently held that federal agencies are not subject to the antitrust laws". *See, Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

The three cases cited by the federal respondents, *Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co., Inc.*, 632 F.2d 680 (7th Cir. 1980), *Sabin v. Berglund*, 585 F.2d 955 (10th Cir. 1978), and *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968), *cert. denied*, 393 U.S. 1000 (1968), deal solely with the sovereign immunity enjoyed by federal agencies acting purely in a governmental, not a proprietary manner. *Champaign-Urbana* involved the federal government in its governmental function as a purchaser for military exchanges, *Sabin* involved governmental action by the Secretary of Agriculture in administering national forest lands, and *Alabama Power* involved a government subsidized loan by the Rural Electrification Administration.[2]

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[1] In fact, Justice Black, in his dissent, specifically stated "that question is not before us and need not be decided." (312 U.S. at 619 n.5).

[2] These cases are further distinguishable in that *Champaign-Urbana* concerned an action arising from violations of the Robinson-Patman Act, *Sabin* reached a determination on the merits that there were no antitrust violations, and *Alabama Power* is of questionable validity in view of *Woods Exploration and Producing Co. v. Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). *See Hecht, supra*, at 934-35 n.6.

The federal respondents can claim no such immunity for "governmental action", since at all times pertinent the Alaska Railroad was acting as a common carrier of freight in direct competition with private enterprise. The federal respondents' reference to the sweeping statutory statement of the purpose of the Alaska Railroad, uttered some sixty-eight years ago, is meaningless and no longer reflects the Railroad's operations. As the government itself recognizes in its Memorandum, "[p]etitioners provide a water-motor carrier service that competes with respondents' water-rail service". When the government enters the marketplace as a competitor, it should be required to answer to the same standards of competitive behavior imposed on those with whom it has chosen to compete.

The writ of certiorari should be granted.

Respectfully submitted,

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January 1982